Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78- 656

MACHIPONGO CLUB, INC.,

Petitioner,

v.

THE NATURE CONSERVANCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS
OF THE UNITED STATES

JONES, BLECHMAN, WOLTZ & KELLY, P.C.

Herbert H. Bateman
2600 Washington Avenue
Newport News, VA 23607

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

OPINIONS BELOW

Fourth Circuit. The opinion of the Fourth Circuit dated July 31, 1978, is reported at 579 F.2d 873 (C.A. 4th Cir. 1978) printed herewith as Appendix A. The Circuit Court of Appeals earlier opinion, dated March 2, 1978, is reported at 571 F.2d 1294 (C.A. 4th Circ. 1978) and is printed as Appendix B.

District Court. The initial opinion of the District Court for the Eastern District of Virginia is reported at 419 F. Supp. 390 (E.D. Va. 1976) (Appendix C). The District Court order of August 3, 1976, denying petitioner motion to modify the original judgment of the District Court is unreported and is attached as Appendix D. The District Court's unreported order following receipt of the mandate of the Fourth Circuit Court of Appeals was entered September 12, 1978 (Appendix E).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on July 31, 1978, and the order of the United States District Court for the Eastern District of Virginia pursuant thereto on September 12, 1978.

QUESTIONS PRESENTED

1 - Did the Fourth Circuit err in reversing the District Court's holding that Machipongo Club had a certain easement or right-of-way from its property on Hog Island to the Atlantic shore of Hog Island by grant or by prescription?

2 - Did the Fourth Circuit err in affirming the District Court's decision denying Machipongo Club the right to use of a road or right-of-way on Hog Island referred to as the North-South road?

3 - Did the Fourth Circuit err in its final decision in the appeal of this matter, in remanding the case to the District Court with direction to conform the final decision on two remaining issues in the case to the final decision of the state courts in pending litigation but not as to the aforementioned issues, when the state court litigation in question deals with all the issues presented in the federal court proceeding?

STATUTORY PROVISIONS INVOLVED

The merits of the case on the issues left undecided are dependent upon the construction of Code of Virginia of 1950, as amended, Section 41.1-3, Section 41.1-4 and Section 62.1-1. These statutes contain prohibition of the grant of certain public lands of the Commonwealth of Virginia. Also involved is Code of Virginia of 1950, as amended, Section 41.1-6 which The Nature Conservancy contends validated its title to certain areas of Hog Island even if those areas were originally granted in violation of the aforementioned statutory prohibitions. (The aforecited statutes are printed as Appendix F. 1-4).

CONCISE STATEMENT OF CASE

This proceeding originated as a suit by The Nature Conservancy (plaintiff) against the Machipongo Club, Inc. (defendant), a West Virginia corporation, alleging trespass by members of the defendant club on property of the plaintiff on Hog Island. Hog Island is an island in the Atlantic Ocean lying off the Eastern Shore of

Virginia in Northampton County, Virginia. The instant case is of far-reaching significance as its disposition inherently affects the title to thousands of acres of riparian property in the Commonwealth of Virginia.

Defendant admits its members had been present on areas of Hog Island to which plaintiff asserts ownership, for purposes of surf fishing and hunting and that its members crossed land of the plaintiff by roads which defendant contends they had the right to use. Defendant further contends that the Atlantic Shore of Hog Island and its "marsh and meadow land" remain property of the Commonwealth of Virginia and constitute "common lands" of the state which are open and available for lawful fishing, fowling and hunting by the public. Defendant's claim of these rights is based upon statutes of Virginia which preserved and protected the areas in question from grant by the state, and that the inclusion of the areas of Hog Island in question in the 1901 land grant from the state to the plaintiff's predecessor in title, was of no legal effect, as in direct violation of statutes in effect at the time of the grant, which have remained in effect at all times since the grant. Defendant denies the grant has been validated by subsequent act of the legislature, as contended by plaintiff.

The District Court (1) upheld defendant's contention that plaintiff's title could not bar defendant from hunting the marsh and meadow land embraced in the grant of 1901 to plaintiff's predecessor in title, (2) held defendants had the right to a road extending from its property on Hog Island across the land of the plaintiff to the Atlantic shore of the island by grant of an easement, or in the alternative, by prescriptive right, (3) that plaintiff's title included the shore or

inter-tidal strip of Hog Island and defendant had no right to fish thereon, (4) that the "North-South" road was not a public road and that defendant had no right to use of the road as an appurtenance to its property, by prescription or otherwise, and (5) that a 1966 Act of the General Assembly of Virginia (Section 41.1-6, Code of Virginia, of 1950, as amended) did not validate the 1901 grant to the extent it was void.

On appeal the Commonwealth of Virginia filed brief as amicus curiae in support of defendant's contention that the 1901 land grant in question was ineffective as a conveyance of the "meadow and marsh land" of Hog Island or its Atlantic shore and that the 1901 grant had not been ratified by statute. The position of the petitioner and the state was that these areas of Hog Island constituted a part of the "common lands" of Virginia reserved from grant by the state for public use as areas for lawful fishing, fowling and hunting. Both defendant and the Commonwealth petitioned the Circuit Court for rehearing en banc following the Fourth Circuit opinion of March 2, 1978. The plaintiff also petitioned for rehearing with respect to the "meadow and marsh land" question and "ratification" statute issues as dealt with in the Circuit Court's opinion of March 2, 1978.

In its brief before the Fourth Circuit the Commonwealth suggested that the Federal Courts abstain from the exercise of its diversity jurisdiction in this case. This suggestion was based on the proposition that the issues were entirely controlled by state law and affected a substantial interest of the state and the public at large, which transcended the issues between the two parties litigant, and should be resolved by the state courts.

Pending a decision on the various Petitions

for Rehearing, a suit was instituted by nineteen plaintiffs against The Nature Conservancy in the Circuit Court of Northampton County, Virginia. This proceeding (Bradford et al v. The Nature Conservancy) presents every issue which was pending in the federal court in this case. The trial of the state court proceeding filed in May, 1978, was concluded after five full days of trial on October 4, 1978, and decision is pending submission of briefs and further oral argument.

REASONS FOR GRANTING THE WRIT

Surprisingly and regrettably the federal courts, both District and Circuit Court of Appeals, have evidenced a lack of understanding of the issues in this case. In a case in which Virginia law is controlling, Virginia statutes and cases have been ignored.

Even upon motion to amend the District Court's initial decision on grounds the court had overlooked or failed to deal with a Virginia statute which defendant asserted was controlling on the most important public issue, the court failed in its order denying the motion to meaningfully address the question.

The Court of Appeals in its March 2, 1978, opinion, summarily affirmed the District Court's decision regarding (1) the Atlantic shore, (2) the meadow and marsh land, (3) the rights to the "North-South" Road and its holding that the 1966 Act of the General Assembly did not validate the 1901 land grant to the extent it was void. Despite the large public signifigance of these issues and the expressed official interest of the Commonwealth of Virginia through its Attorney General, the Fourth Circuit Court of Appeals did not elucidate or discuss any of them. This was done even though

counsel for the parties and the Attorney General pointed out patent legal misconceptions of the District Court even where counsel agreed with the holding of the District Court.

On the remaining issue respecting the right-of-way to the Atlantic Shore, the Court of Appeals discussed the issue extensively and reversed the trial court. In doing so, it cited isolated fragments of testimony suggesting a failure to review the evidence as a whole, rejected the trial court's findings of fact, failed to adhere to settled Virginia law as to construction of deeds, and Virginia law respecting prescriptive easements.

This court has as one of its responsibilities the supervision of the functioning and quality of the performance of the inferior courts in the federal judicial system. Petitioner respectfully contends the District Court and Fourth Circuit Court of Appeals treatment of this case does not reflect the normally high standards of quality and judicial craftsmanship which the issues and the public interest requires. Only by grant of this Petition For Writ of Certiorari can this shortcoming be rectified.

Ultimately, the Fourth Circuit has acceded to the suggestion that the federal courts withhold judgment on two of the significant public questions pending the adjudication of those issues by the state court in the pending proceeding. Yet on two issues involving the rights-of-way which are critical to the practical use and enjoyment of the "common lands" of the Commonwealth, it has proceeded to adjudicate those issues. The issue with respect to the "North-South" road is an issue which affects more than the private rights of the plaintiff and defendant. It involves a question as to whether or not the "North-South" road is a public road.

There is no logic or reasoned basis for a mandate disposing of the road questions, while directing the United States District Court to withhold any decision on the Atlantic shore and meadow and marsh land issues. In a legal and especially in a practical sense, all these issues are interrelated. They should not be adjudicated piecemeal as the Fourth Circuit has directed.

If the state court, which is meticulously addressing all these issues, should resolve the issue as to the roads differently from the way they have been resolved by the Fourth Circuit, an unnecessary legal anomaly will have been created. It would mean that on a question to be determined according to state law, a state court's determination may be at variance with a prior but generally contemporaneous judgment of a federal court, bound under Erie R.R. v. Tompkins 304 U.S. 64, 82 L. Ed. 1188 (1938) to follow the decision of a state court. This would result in "law of the case" as to Petitioner, denying petitioner rights which the state court may determine are rights of the public at large, under controlling state court construction of the issues of law. Such an anomaly can easily be avoided by grant of this petition and remand of this entire litigation to the District Court with direction to conform its judgment on all issues to the final decision of the state court.

CONCLUSION

By grant of this Petition, piecemeal determination of issues which are exclusviely controlled by state law, can be avoided. Comity with the state of Virginia and its courts supports leaving the significant public questions presented in this case for determination by the courts of Virginia. By grant of this Petition, both parties litigant can be assured of a full, fair and complete determination of the issues of Virginia law without

likelihood of contemporaneous, conflicting resolution of one or more issues by the federal and state court. Grant of the Petition and a simple order remanding all issues to the United States District Court for the Eastern District of Virginia with direction to conform its final judgment on all issues to the state court decision in a pending case, is all that grant of this Petition would involve. No burden on the over-burdened federal judicial system is necessary if this Petition be granted.

For the reasons stated, this Petition should be granted and the cause remanded to the District Court.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY,P.C.

Herbert H. Bateman
2600 Washington Avenue
Newport News, Virginia 23607

Counsel for Petitioner

October 1978

APPENDIX A

The NATURE CONSERVANCY,

Plaintiff,

v.

MACHIPONGO CLUB, INC., Defendant.

Civ. A. No. 74-461-N.

United States District Court,

E. D. Virginia,

Norfolk Division.

July 14, 1976

MEMORANDUM OPINION

CLARKE, District Judge.

The parties to this suit each own land on the northern end of Hog Island, a barrier island located in the County of Northampton, Virginia. The Nature Conservancy seeks monetary and injunctive relief for alleged acts of trespass upon its real property by the members, guests, employees and agents of the Machipongo Club, Inc. In addition to specific acts of alleged trespass on the upland portions of Hog Island, the dispute concerns the ownership and/or right to use the marsh and meadowland and beaches of Hog Island as well as certain roads or trails located on the island.

Hog Island is one of several barrier islands bordering the eastern coast of Virginia's Eastern

Shore. By definition, a barrier island acts as a shield to protect the mainland from the direct force and effect of the Atlantic Ocean. The forces of nature have combined over time to erode the southern end and to build up the northeast section of the island. By virtue of a series of hurricanes in the 1930's, the small town of Broadwater, located on the southern tip of Hog Island, was forced out of existence. The land once occupied by the town is submerged. There are no longer any permanent residents living on the island.

The Nature Conservancy is a non-profit District of Columbia corporation headquartered in Arlington, Virginia. The purpose of the organization is to preserve the complete spectrum of biological diversity now existing on the Continent of North America. In fulfillment of this goal, The Nature Conservancy has purchased portions of and entire barrier islands bordering the eastern coast of Virginia's Eastern Shore. Once land is acquired, The Nature Conservancy follows its stated purposes of preservation and scientific study by curtailing certain human uses which it believes would interrupt the processes of nature.

The Machipongo Club, Inc., a West Virginia corporation, was formed for the express purpose of acquiring a parcel of land on the northern end of Hog Island so as to provide a clubhouse for the recreational enjoyment of its members and guests. The recreational pursuits of club members and guests have included fishing, swimming, hunting, and birding.

The case is before the Court for decision on the evidence presented at trial and the post-trial memoranda of counsel. Jurisdiction for

the action is founded upon 28 U.S.C. §§ 1332(a)(1) and 1332(c). Venue is based upon 28 U.S.C. § 1391.

The Nature Conservancy (hereinafter referred to as the Conservancy) claims that the Machipongo Club, Inc.'s (hereinafter referred to as the Club) members, guests, agents and employees have committed numerous acts of trespass on land owned by the Conservancy. The Conservancy asserts ownership of the entire northern section of Hog Island including the beaches and marshland to the ordinary low-water mark, but excluding a 5.4 acre parcel owned by the Club. The basis for the Conservancy's action of trespass includes the Club's admitted use of the following areas on the northern section of the island:

1. The Atlantic beach between mean high water and mean low water.

2. The marsh and meadowlands of Hog Island.

3. A "right-of-way" beginning at the Machipongo Clubhouse (formerly the Coast Guard Station) and running to the Atlantic beach (hereinafter referred to as the beach access road).

4. A "road" running south from the beach access road for the length of the island thereby bisecting the Conservancy's property (hereinafter referred to as the north-south road).[1]

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[1] Throughout the opinion the word "road" is used in its generic sense "mean(ing) all kinds of ways, whether they be carriageways, driftways, bridleways, or footways." Terry v. McClung, 104 Va. 599, 52 S.E. 355, 356 (1905).

In defense, the Club denies the Conservancy has shown proof of any trespass on land which the Club admits the Conservancy owns and states that the Conservancy, in fact, does not have title to the beach access road, the beach face, the north-south road, or the marsh and meadowland of Hog Island.

Additional acts of trespass in driving vehicles over sand dunes and through bird nesting areas are charged by the Conservancy but are also denied by the Club.

I

A. The North-South Road

Three legal theories are offered by the Club in support of its alleged right to travel the north-south road: (1) the United States Coast Guard was conveyed the beach access road right-of-way thereby giving the Coast Guard and its successors-in-title the right to use the intersecting north-south road; (2) by implied dedication and acceptance by continuous public use, the north-south road has become a public road; and (3) the prescriptive use of the north-south road for more than twenty years by the Club's predecessor-in-title has created either a public or private right-of-way.

(1) (1) The Club's contention that the use of the north-south road is a part of the right, appurtenance and advantage conveyed to the Club by the Coast Guard is without merit. Assuming, as the Club asserts, the Coast Guard was conveyed the right-of-way referred to previously as the beach access road, there is still no legal or evidentiary support for the proposition that an intersecting roadway necessarily becomes a

concurrent right, appurtenance and advantage to the possessor of the beach access road easement. No reference to a north-south road is shown in the Coast Guard plat (Defendant's Exhibit 9) relied upon by the Club as showing a conveyance of the beach access road. There is no mention of the north-south right-of-way in the Conservancy's deed from the O'Neils requiring reservation of such a road from the land conveyed to the Conservancy. The logic and evidence supporting the Club's claim of a beach access road does not extend to embrace the conveyance of a north-south right of way.[2]

(2) The second theory of the Club is that the north-south roadway is a public road. The Club contends the road belongs to the public by an implied dedication which was accepted by virtue of continuous public use.

The well-settled law in Virginia concerning dedication of private land to the public was succinctly stated in Buntin v. City of Danville, 93 Va. 200, 24 S.E. 830 (1896) in the following language:

> ". . . 'The principle of dedication by the act of the owner of land,' said Judge Staples in Harris' Case, 20 Grat. 833, 'is now almost universally recognized as a part of the common law in this country.' Dedication is an appropriation of land by its owner for the public use. It may be express or implied.

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2 A beach access road is shown on a 1935 Coast Guard plat which was allegedly submitted as part of the deed of conveyance from the O'Neil family to the Coast Guard.

> It may be implied from long use by the public of the land claimed to have been dedicated. Dedication is not required to be made by a deed or other writing, but may be effectually and validly done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested. It must, however, be manifested by some unequivocal act, and is not effectual and binding until accepted. When the intention of the owner to make the dedication has been unequivocally manifested, and there has been acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper, the dedication is complete. (citations omitted) And when it is complete it is irrevocable." Id. 24 S.E. at 830.

This language was quoted with approval in Greenco Corporation v. City of Virginia Beach, 214 Va. 201, 198 S.E.2d 496, 501 (1973).

(2) From Buntin, it is seen that there must be an appropriation of the land by the private citizen, which, when made, is irrevocable and an acceptance by the public of the land.

(3-6) Dedication of land for use as a public road may be implied from the owner's actions and the long and continuous use of the roadway by the public. City of Norfolk v. Meredith, 204 Va. 485, 132 S.E.2d 431, 433 (1963). Likewise, acceptance of dedicated land may be implied by long-continued use by the public under circumstances rendering reclamation unjust and improper.

The intention of the owner is the paramount consideration; therefore, the owner's intention to dedicate his land must be "unequivocally manifested." Buntin v. City of Danville, 93 Va. 200, 24 S.E. 830 (1896). In making a determination as to whether there has been a dedication and acceptance, "it is proper that the court consider the intent, purpose, importance and benefit of the dedication to the public, as well as other factors." Greenco Corporation v. City of Virginia Beach supra at 198 S.E.2d 501.

The north-south road runs generally from the southern tip of Hog Island parallel to the marshland on the western side of the island until it intersects the beach access road on the northern end of the island. The course of the north-south road, referred to by some witnesses as a "trail," has changed only slightly over the years. The road has never been maintained by the state and any surfacing has been limited to placing oyster shells on a southern portion of the road (Tr. 304-5, 315-16). Throughout its existence, the road could be described best as unimproved. If repairs were needed, the people would use sand to fill holes on its southern end but on the less traveled northern end, repairs would be forsaken for the creation of a new path around impassable portions. The greatest utilization of the north-south road occurred prior to about 1941 when the Town of Broadwater was still in existence. For a few years (about 1936-1940), the Coast Guard maintained stations on both ends of the island and used the north-south road for travel between the stations. (Tr. 246-65, 291-92). It is clear, however, that the residents of Broadwater, as well as the Coast Guard, preferred the use of the beach when the tide permitted for travel between the north

and south ends of the island. With the disappearance of the Town of Broadwater, use of the north-south road on a regular basis was limited to the Coast Guard, although the road has provided the only inland travel for all those who have come to fish, hunt, bird watch or otherwise enjoy the island. The north-south road carried people, ponies or ox-carts until the second decade of this century when motor vehicles were introduced to the island. (Tr. 260). Motor vehicles are currently being used by the Club on this road.[3] (Tr. 322-23).

(7) The evidence reveals that the north-south road has been used continually for more than seventy years by residents and visitors to Hog Island and that use of the road has not been abated although there is less traffic due to the absence of permanent residents. Such long and continuous use of a roadway by the public raises the presumption of a dedication by the owners of the land. Buntin v. City of Danville, 93 Va. 200, 24 S.E. 830 (1896).

Ownership of the land containing the portion of the north-south road running through the Conservancy's land has at various times been in the Commonwealth of Virginia, the Powells by virtue of a land grant in 1901, the Duntons,

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[3] Various maps introduced by the Club as trial exhibits show an unimproved road running in a north-south direction for most of the length of the island. The earliest map is dated 1851 and the most recent is a 1968 U.S. Geological Survey map.

Browns and the Edward O'Neil family.[4] There is no evidence that any of these parties either complained of the use by others of the north-south road or ever verbally or in writing manifested an intention to dedicate land for a public road.

In Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 220 S.E.2d 247 (1974), the consequences of a completed dedication and the methods of showing acceptance of dedicated land were set forth:

> ". . . Since a completed dedication imposes the burden of maintenance and potential tort liability upon the public, a dedication does not become complete until the public or competent public authority manifests an intent to accept the offer. Such intent can be manifested expressly; by implication from public user of requisite character, Buntin v. Danville City, 93 Va. 200, 204-205, 24 S.E. 830 (1896); or by implication from an 'exercise of jurisdiction and dominion' by the governing authority, Staunton v. Augusta Corporation, 619 Va. 424, 436, 193 S.E. 695, 699 (1937)." Id. 200 S.E.2d at 250.

No evidence has been introduced tending to show an expression by any public authority of an intent to accept the north-south road for public use, or to exercise any control over the use of the road which would manifest such in intent.

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4 Plaintiff's exhibits 1-5 are deeds of conveyance between these parties.

The Club relies solely on the public use of the north-south road to show a willingness of the public to assume the burden of maintenance and potential tort liability.

The historical use of both the north-south road and the rest of the island is one of free access to all lands, marshes, and shorelines. People living and working on the island continually traveled within its borders without regard for boundary lines. No one objected, for such activity was either encouraged or condoned. It is apparent that, to many, this utopian approach to land ownerhsip blurred the concept of public and private land on the uninhabited portions of the island.

Little attention has ever been given by the public to the maintenance of the north-south road beyond its southern boundaries. Less traveled sections of the road which became impassable were circumvented rather than repaired. No substantial improvement of the roadway was ever made. The beach face, not the north-south road, was the favored route of travel to and from the northern end of the island.

(8, 9) From these facts, the Court can find neither an intent by the various landowners to permanently dedicate or appropriate the use of their land over which the north-south road runs nor an acceptance of the land as a public road. Furthermore, the circumstances of the case do not render the reclamation of the land by the Conservancy unjust. There has been no showing of a loss of livelihood or bar of access by the Club to its own land if access to the seldom used north-south road is closed. Where acceptance

of a dedication is based on public use and the circumstances of the case do not support acceptance of the land as a public road, the dedication remains incomplete. City of Norfolk v. Meredith, 204 Va. 485, 132 S.E.2d 431 (1963).

(3) The Club bases its argument for a public prescriptive right to use the north-south road on a theory that continuous and uninterrupted public use under a claim of right that is adverse to the owner's interest for a sufficient period of time, creates a public prescriptive right to use the north-south road. See 39 C.J.S. Highways § 3 (1944). The Conservancy contends that under this standard the Club has failed to show hostile or adverse use of the road. The Club replies that recurring use of a part of private land as a right-of-way is either hostile or adverse to the extent the use is inconsistent with the owner's fee simple title, or the duration of the use raises the presumption of an adverse use under a claim of right. If the frequency or duration of use has not been adequately shown, then the Club argues the recurring use is evidence of an implied dedication and acceptance.

(10, 11) The Club seeks to draw a distinction between creation of a public road by dedication and acceptance and the establishment of an easement by public prescription. The general rule in Virginia is that the public acquires only an easement in land condemned or dedicated as a public highway and the fee remains in the owner subject to the right of passage. Bond v. Green, 189 Va. 23, 52 S.E.2d 169, 173 (1949). In Virginia, therefore, prescriptive use of a road by the public is evidence of an implied dedication and acceptance of a road for public use.

(12) The same evidence offered as proof of a public prescriptive easement was presented in support of classifying the north-south roadway as a public road. No Virginia authority has been cited to distinguish the concept of a public road easement from an implied dedication and acceptance of land for use as a public road. Under the facts of this case, the Court can find no distinguishing features of the law.

(13) To establish a private easement by prescription, the Club is required to show that the use of the road was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the landowner for at least twenty years. Robertson v. Robertson, 214 Va. 76, 197, S.E.2d 183, 188 (1973). From the evidence, there is ample proof of a continuous and uninterrupted use of the north-south road by the Club and its predecessor-in-title for more than twenty years. Briefly stated, the Club's grantor, the Coast Guard, used the north-south road from 1935 until abandonment of the station in 1964. The use of the road was otherwise continuous and uninterrupted, exceeding a period of twenty years. The Conservancy's grantor never objected to use of the north-south road.

(14, 15) The Club's and its predessor-in-title's "open, visible continuous, and unmolested use" of the north-south road for at least twenty years raises the presumption of use under a claim of right. The burden rests on the Conservancy to rebut the presumption by showing the use of its property was merely permissive. Craig v. Kennedy, 202 Va. 654, 119 S.E.2d 320, 323 (1961). However, the Club has failed to show an exclusive use of the road necessary to establish a private easement over the Conservan-

cy's land. In a similar case, Stanley v. Mullins, 187 Va. 193 45 S.E.2d 881 (1948), use and enjoyment of a road over private land was held not to create either a private easement or a public road. As to creation of a private easement, the Court stated that the use of the road by those alleging a private road was in common with people and dependent for its enjoyment on similar rights in others. Id. at 884-85. The absence of a claim independent of all others precludes establishment of the necessary exclusiveness required to create a private easement.

For the reasons stated, the north-south road traversing the Conservancy's land is held to be neither a public road nor a private easement and the Club's members, guests, employees, and agents have no right to use this road without the permission of the Conservancy.

B. The beach access road

The Conservancy contends that the Club, upon purchase of a 5.4 acre parcel of land containing the United States Coast Guard station at the north end of Hog Island, acquired no right-of-way, easement or other right which would permit the Club to travel outside the 5.4 acre parcel. Allegedly, this prohibits use of the beach access road which runs from the former Coast Guard station in an easterly direction toward the Atlantic shoreline of the island. From 1935 until the property was sold to the Club, the Coast Guard had maintained the road by the addition of oyster shells to provide a surface adequate to withstand the natural elements. When originally improved, the beach access road ended at the beach. Accretion and alluvium to

the northern Atlantic shoreline of the island in recent years have substantially increased the area of land between the Coast Guard station and the beach.

(16) In 1935 the O'Neil family conveyed with general warranty a 5.4 acre parcel of land on the northern end of Hog Island to the United States of America for use as a Coast Guard station. The conveyance included all privileges and appurtenances thereunto belonging and was represented by a deed and plat. The plat (Defendant's Exhibit 9) shows the dimensions of the 5.4 acre parcel and a portion of a right-of-way at the southeast corner of the property described as "Location of 50' Right of Way about 780' to Higher Beach." The Conservancy argues that omission from the deed of the language of the right-of-way is evidence of an intention to limit the conveyance to a 5.4 acre parcel. The rule in Virginia is that a grantor is bound by the description of property contained in a plat which has been incorporated by reference into a deed. Bossieux v. Shapiro, 154 Va. 255, 153 S.E. 667, 668 (1930). The description of the 5.4 acre parcel in the deed between the United States and the O'Neils concluded with the phrase, "all of which is shown on a map, attached hereto, by United States Coast Guard, Civil Engineers' Office, Washington, D.C., Nos. 101, 166, dated 10/11/35." Consequently, a right-of-way was conveyed to the Coast Guard by the O'Neil family by virtue of the December 6, 1935, deed and incorporated plat.

(17) In 1966 the Coast Guard station property was sold at public auction to the Club. A quitclaim deed was executed between the parties conveying without warranty "the same piece or parcel of land" which was conveyed to the United

States of America from the O'Neil family, "Together with the improvements thereon, and the rights, roads ways (sic), waters, privileges, appurtenances, and advantages, to the same belonging or in anywise appertaining." No express mention is made of an easement or right-of-way to the beach. Nevertheless, the all-inclusive language of the deed, the fact that the Club through one of its organizers had conducted a pre-purchase inspection of the premises, the use of the road by the Coast Guard, and the intended use of the Coast Guard Station by the Club all indicate a belief that the 5.4 acre parcel and the beach access road then existing were being acquired together. There was no exception made in the deed of conveyance of the beach access road right-of-way, nor was there any mention or description of it in the deed of conveyance. Notwithstanding the lack of specificity, the beach access road under the circumstances was transferred to the Club as an appurtenance to the 5.4 acre parcel described in the quitclaim deed. See Cushman Virginia Corporation v. Barnes, 204 Va. 245, 129 S.E.2d 633, 638 (1963).

(18) The remaining question is the length of the Club's right-of-way. Adherence to the 780 foot distance shown on the plat recorded with the deed of conveyance of the 5.4 acre parcel from the O'Neil family to the Coast Guard places the end of the easement near the marsh line existing in 1942 (Defendant's Exhibit 14). If the "higher beach" is used as the demarcation line for the termination of the "about 780'" right-of-way, a correct measurement would not be possible because of a lack of evidence of the meaning of the term "higher beach." There is, however, some evidence of the purpose of the 780

foot easement in the Testimony of Edward O'Neil, II, the Coast Guard's predecessor-in-title. Mr. O'Neil stated that the reason for acquiring the right-of-way was never put in writing to his knowledge, but that he got the idea from somewhere that the road was to be used to get equipment across to a high point above high water (O'Neil deposition, pp. 43, 46 & 47). Mr. O'Neil's testimony is admittedly supposition on his part (O'Neil deposition, pp. 30-31). Nevertheless, the 1970 survey of the northern end of Hog Island, introduced into evidence by the Club, supports the conclusion reached by Mr. O'Neil.

The distance of the recorded right-of-way does not accord with the actual use made of the road and the extensions brought about by accretion and alluvium to the northeast shoreline of Hog Island. Sufficient evidence does exist to support a finding that the United States Coast Guard acquired a right-of-way to the beach by prescriptive use. The private easement was gained from continuous and uninterrupted travel to the beach from the Coast Guard Station for more than twenty years.

The Coast Guard acquired the 5.4 acre parcel from the O'Neil family in 1935. A lifesaving station was built within a year. Members of the Coast Guard freely used the island, traveling the north-south road as well as the beach access road which the Coast Guard had improved. Unlike the north-south road, use of the beach access road by the public was probably less extensive. More importantly, a claim of right to use the beach access road in its entirety can be found in the easement granted by the O'Neil family. It is evident that the easement of about 780 feet to the "higher beach" does not lend itself

to preciseness and that the functions of the Coast Guard would occasion frequent access to the Atlantic shoreline. The use of the beach access road by the Coast Guard would be for purposes distinct from that of the general public and would emanate from the duties encumbent upon Coast Guard personnel. Furthermore, the beach access road leads to the Coast Guard Station and to no other structure or place on the island. Such circumstances support a finding of use under a claim of exclusive, peculiar and distinct right in the absence of proof to the contrary.

(19) The circumstances dictate a finding of exclusive, continuous and uninterrupted adverse use for more than twenty years of the beach access road by the Coast Guard under a claim of right with the acquiescence of the landowner. See Robertson v. Robertson, 214 Va. 76, 197 S.E.2d 183 (1973). Accordingly, the Coast Guard acquired a private easement by prescription from the end of their granted road to the beach face which was later conveyed to the Club as a privilege and appurtenance of the 5.4 acre parcel.

(20-22) Continued expansion of the beach on the northeast shoreline of Hog Island leaves unanswered the question of whether the prescriptive easement extends to the beach face as it is now constituted. The Club claims it is entitled to the benefit of any accretion or alluvium which has occurred on the northeast section of Hog Island whereby the beach access road has been lengthened. The owner of a shore or river bank enjoys the benefits of accretion and alluvium to his land. Steelman v. Field, 142 Va. 383, 128 S.E. 588 (1925). The justification

for such a rule is that the great value of being a riparian owner is the right to have access to the water. Id. 128 S.E. at 559-60. The same principles apply with equal force to the possessor of an easement to the beach. The purpose of the beach access road is to afford a means of travel between the Coast Guard Station and the beach. The use of the road has continued throughout the period of time in which the beach has been increased by alluvial deposits. There is no sound reason to terminate use because the easement has been lengthened beyond its original dimensions by accretion and alluvium.

C. The Atlantic beach and the marshland

The Conservancy has offered evidence to show that the boundaries of its land on Hog Island extend to the low-water mark so as to encompass the Atlantic beach between the mean high-water and mean low-water marks and the marshland to the extent the marshes lie above mean low-water. The Club maintains that the Atlantic beach and the meadows and marshland of Hog Island to which the Conservancy claims ownership are not subject to private ownership. In support, the Club argues that Virginia statutes in effect at the time of the grant of the Powell tract from the Commonwealth of Virginia to the Powells prohibited and continue to prohibit a land grant encompassing "common lands" and "meadows and marshes of the Eastern Shore."[5]

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5 Sections 1338 and 1339 of the Code of Virginia of 1887. See also Va. Code Ann. §§ 62.1-1 and 41.1-4 (1950, as amended).

The Conservancy offers the following muniments to sustain its assertion of ownership to the beach and marshes abutting the upland tract of land which it undisputedly owns:

1. A grant dated February 2, 1901, from the Commonwealth of Virginia to E. T. Powell of a certain parcel of land containing 1422½ acres, lying on the north end of Hog Island.

2. A deed dated January 1, 1910, between Edwin T. Powell and Edna P. Powell, his wife, and Edward O'Neil conveying a parcel of land containing 1422½ acres to Edward O'Neil as described in the Powell grant.

3. A deed dated January 6, 1917, between James S. Dunton, Sr., and others, and Edward O'Neil, conveying to Edward O'Neil a parcel of land containing about 424 acres contiguous with the Powell grant on its east and north boundaries.

4. A deed dated October 1, 1921, between Calvin Brown and others, and Edward O'Neil, conveying to Edward O'Neil about 231 acres of land immediately south and adjacent to the former Dunton tract.

5. A deed dated December 21, 1970, between George Potter O'Neil and others, and The Nature Conservancy, conveying to The Nature Conservancy the Brown, Dunton and Powell tracts with the express exception of the parcel of land heretofore deeded to the United States Coast Guard in 1935.

The land grant from the Commonwealth of Virginia to the Powells in 1901 conveyed the north end of Hog Island, following in part the shoreline of the Atlantic Ocean at the low-water mark. The chain of title has remained intact and has carried forth the same description of the Powell tract to the Conservancy's deed of conveyance. Section 1339 of the Code of Virginia of 1887, which was in effect at the time of the Powell grant in 1901, set forth the boundaries of land lying on the shores of the sea. The boundary of land abutting the sea is placed at the "low water mark, but no farther, unless where a creek or river, or some part thereof, is comprised within the limits of a lawful survey."[6] The terms of Section 1339 are expressly subject to the provision of Section 1338, which reads in full:

"Sec. 1338. Beds of bays, rivers, and creeks, and shores of the sea, ungranted, to remain in common.---All the beds of the bays, rivers,

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6 Section 1339 of the Code of Virginia of 1887 reads in full:

"Subject to the provisions of the preceding section, the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks, and shores, and the rights and privileges of the owners of such lands, shall extend to low water mark, but no farther, unless where a creek or river, or some part thereof, is comprised within the limits of a lawful survey."

creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters and other shell fish, subject to the provisions of chapters ninety-five, ninety-six, and ninety-seven, and any future laws that may be passed by the General Assembly; and no grant shall hereafter be issued by the Register of the Land Office to pass any estate or interest of the commonwealth in any natural oyster bed, rock, or shoal, whether the said bed, rock, or shoal shall ebb bare or not."

Contrary meanings are placed by the parties on the wording of Section 1338. The Club interprets Section 1338 as voiding the 1901 Powell grant as it relates to the Atlantic shoreline of Hog Island between mean low water and mean high water, if the Atlantic beach was an ungranted section of the common land of Virginia in 1901. On the other hand, the Conservancy asserts that Section 1338 vests title to the shores of the sea in the Commonwealth of Virginia to assure the public of fishing and fowling rights, but does not prohibit the granting of the shores of the sea to private parties in compliance with statutory procedures.

(23) Section 1338 of the Code of 1887 established that Virginia seashores would remain as property of the State unless conveyed by special grant or compact according to law. There is no requirement in the statute that seashores qualifying under the historical doctrine

of "common lands" forever remain in that status.[7] The statute contains an express prohibition against grants by the State of its interest in "any natural oyster bed, rock, or shoal," but there is no corresponding prohibition dealing with the shores of the sea. In Taylor v. Commonwealth, 102 Va. 759, 47 S.E. 875 (1904), Section 1338 was viewed as a declaration of the right in the State to the navigable waters and soil under them within the state's territorial limits, sanctioned and supported by common law. It would be inconsistent to read the statute as invalidating provisions within the property law of Virginia concerning the grant of land owned by the State.

(24) Operation of Section 1338 on the facts of this case validates the grant of the Commonwealth of Virginia to the Powells in 1901; there being no challenge by the Club to the grant on the ground that it was not validly procured. Challice v. Clark, 163 Va. 98, 175 S.E. 770, 774 (1934). Accordingly, the Conservancy's holdings incorporate the Atlantic beach to the ordinary low-watermark as described in its deed of conveyance from the O'Neil family, at least to the extent of what was formerly the Powell tract. There is, however, no evidence of the derivation of title to the Brown and Dunton tracts on which to make a finding of ownership of the beach abutting those tracts.

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[7] See Miller v. Commonwealth, 159 Va. 924, 166 S.E. 557 (1932) for a discussion of the historical doctrine of "common lands" in Virginia.

Ownership of the marsh and meadow land encompassed by the Powell grant in 1901 and eventually conveyed to the Conservancy is governed by a statute enacted in 1888, which provided in full:

> "1. Be it enacted by the general assembly of Virginia, That all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this state, shall continue as such common, shall remain ungranted, and no land warrant located upon the same. That any of the people of this state may fish, fowl, or hunt on any such marsh or meadow lands.
>
> "2. This act shall be in force from its passage."
>
> Acts 1887-88, p. 273, c. 219.

(25) The Club contends that the marshland contained in the Powell grant was common land prior to 1901 and must remain as such for public fishing and fowling. The statute expressly prohibits the grant by the Commonwealth of unappropriated marshland (1) lying on the Eastern Shore, (2) which has been used as a common by the people of the Commonwealth, and (3) which has not previously been granted.

The history of Hog Island, as revealed in this case, is embodied in the remembrances of Harvey L. Bowen, a native born on the island in 1901. Mr. Bowen testified that residents and visitors to Hog Island traveled the island at will without objection from landowners (Tr. 274, 275); that the island had a prosperous economy (Tr. 255); that there were no law enforcement

officers; that the configuration of the island has been constantly changing (Tr. 257-61); and that the marshland from the north to the south end of the island, with the exception of one estate, was used by everyone for fishing and hunting (Tr. 317, 318). The carefree lifestyle enjoyed by the former inhabitants of Hog Island has been continued by those who now come to the island.

The recollections of Mr. Bowen are limited to his personal observations as a resident of Hog Island and the folklore of the area as relayed by his elders. Mr. Bowen testified in a historical context as to the use of the island by residents and visitors. Contradictory evidence has not been introduced. The Court is of the opinion that Mr. Bowen's testimony fairly relates the lifestyle on Hog Island prior to 1901. As such, there is ample support for the conclusion that the marsh and meadow lands of Hog Island were used as a common by the residents of Virginia.

The remaining elements of the statute have also been satisfied. Title to the northern end of Hog Island prior to 1901 was vested in the Commonwealth of Virginia. This unappropriated land included property owned by the Conservancy and the Club which is traced to the Powell grant. It is undisputed that the marshes and meadow lands in issue lie in the County of Northampton, Virginia, and are part of a barrier island of the Eastern Shore of Virginia.

In Powell v. Field, 155 Va. 612, 155 S.E. 819 (1930), the appellants claimed marshland on the Eastern Shore of Virginia by virtue of a lease from the state. The appellees claimed the same land through an 1897 patent granting the land in

controversy to appellees' predecessor-in-title. The precise issue before the Court was when in a procedural process does a grantee of uappropriated lands acquire a vested interest. In holding that a grant of land is not complete prior to fulfillment of all statutory requirements, the Supreme Court of Appeals applied the Acts of Assembly 1887-88, p. 273, c. 219, with full force and declared void the grant to appellees' predecessor-in-title. The parties in Powell had stipulated that the marshland was previously unappropriated and was used in common. In this case, the Club has borne the burden of proving these elements. Accordingly, any marshes and meadow land included in the grant of the Commonwealth of Virginia to the Powells is null and void. Such lands belong to the people of Virginia for the purposes of fishing, fowling or hunting. Again, there is no evidence of the derivation of the title to the Brown and Dunton tracts and the Court is unable to say whether the marshlands in those tracts are public or not. As to those portions of its land, the Conservancy has failed to carry its burden of proof.

(26) The Conservancy argues that, notwithstanding the statutory prohibition of grants of marshland on the Eastern Shore of Virginia, the Virginia legislature has retroactively validated the Powell grant. Va. Code Ann. § 41.1-6 (1970) Repl. Vol.). Section 41.1-6 (§ 41-8.3 of the Code of 1950) was originally enacted in 1966 for the purpose of ratifying grants issued by the State Librarian (successor to the Register of the Land Office) pursuant to Section 41.1-3 (§ 41-8 of the Code of 1950). Section 41.1-3 carries the proviso that "this section shall not be construed to affect the title to grants issued prior to March fifteen, nineteen hundred

thirty-two." Under this statutory scheme grants issued in accordance with Section 41.1-3 are ratified, but expressly excluded from the operation of Section 41.1-3 are grants issued prior to 1932. The retroactivity provisions of Section 41.1-6, therefore, do not apply to the Powell grant of 1901.

II.

(27-30) The law of trespass to real property in Virginia is governed by the general principle that "every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another." Tate v. Ogg, 170 Va. 95, 195 S.E. 496, 498 (1938). Thus, every unauthorized entry upon the real property of another without legal authority resulting in some damage, however minuscule, constitutes a trespass. See generally 18 Michie's Jurisprudence, Trespass, § 2 (1974 Repl. Vol.). To maintain an action of trespass in Virginia, "there must have been possession---either actual or constructive---in the plaintiff when the trespass was committed." Blackford v. Rogers 2 Va. Dec. 292, 23 S.E. 896, 897 (1896). The burden therefore, is upon the Conservancy to prove by a preponderance of the evidence the identity and location of the land which it claims and to show that it has legal title to the land in controversy. W. M. Ritter Lumber Co. v. Edwards, 171 Va. 185, 198 S.E. 433, 434 (1938).

(31) The Club has admitted use of certain portions of Hog Island outside the perimeters of a 5.4 acre parcel to which the Conservancy seeks to limit the Club. As a matter of law, the use

of the beach access road and the marshes and meadow land of Hog Island is not an act of trespass. On the other hand, travel on the Atlantic beach belonging to the Conservancy and the portion of the north-south road bisecting the Conservancy's lands constitutes unauthorized use of the Conservancy's property. In addition, the Conservancy has set forth a number of incidents which allegedly are acts of trespass:

1. Damage to a black skimmer nesting colony and to the nesting areas of other birds.

2. Vehicular use in the dune area of the Conservancy's land.

3. Human travel in a shrub thicket located on the Conservancy's property.

4. Hunting and the leaving of litter on the Conservancy's property.

(32) None of these enumerated incidents of alleged trespass have been proven as acts of the Club. Members, guests and employees have been observed on the Atlantic beach and the beach access road. There is testimony of indiscriminate use of vehicles over the Conservancy's property, of litter, baiting, and damage to subterranean fauna, sand dunes, and wildlife. All the activities testified to may be harmful to the ecology of Hog Island and lessen the Conservancy's enjoyment of its property; however, there is no direct evidence of the involvement of any of the Club's employees, guests, agents or members in the described activities. The circumstantial evidence tending to show the responsiblity of the Club is weakened by the fact that the island's beaches, marshes and inland spaces are used by other landowners on

Hog Island and by the public for many of the same activities engaged in by the Club's members and guests.[8] Based upon this background of use of Hog Island and the evidence presented by the Conservancy, there is insufficient proof to establish acts of trespass beyond the use of the north-south road and the beaches. Consequently, the issue of monetary relief for damages to the ecology of Hog Island need not be considered except as it pertains to the use of the north-south road and the Atlantic beach between mean low water and mean high water.

III

(33) The use of the north-south road and the Atlantic beach by the Club's members, guests, employees and agents has not been shown to have caused damage to the Conservancy's property. Again, the Conservancy has not met the burden of proving either by direct or circumstantial evidence that the Club is responsible for the damage the Conservancy claims. The Conservancy is, therefore, limited to a recovery of nominal damages. See McClannan v. Chaplain, 136 Va. 1, 116 S.E. 495 (1923).

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[8] There is uncontradicted evidence that visitors to the island or other landowners have brought vehicles to Hog Island by use of barges, landed airplanes on the Atlantic beach and docked boats at the Club's pier without prior permission.

The Club opposes a grant of injunctive relief to the Conservancy on several grounds, stating that the injunctive relief is barred by either the doctrine of clean hands, the doctrine of laches, or the failure of the Conservancy to show a clear or unquestioned right or title in its property. All of the theories advanced by the Club to bar injunctive relief are not supported by the evidence in this case.

(34) The Club asserts the doctrine of laches based on the Conservancy's acquisition of its Hog Island property in December 1970, and the failure to bring suit until October 1974. Even if the Conservancy had knowledge of the controversy in 1970, the Conservancy had no duty to promptly enter suit. The meritorious allegations of trespass in this case concern activities of the Club which it pursued under a claim of right. Furthermore, the infrequent use of the island by the Club's members, its isolation and the lack of opportunity by the Conservancy's employees to make day-to-day observations all indicate that a four-year interval between purchase and filing suit is not unreasonable.

(35) The Club seeks to show a lack of "clean hands" in the Conservancy because of instances in which agents of the Conservancy have come upon the Club's land without prior permission. Invocation of the doctrine of clean hands will not be applied where an inequitable result would follow or where the parties would have to resort to further litigation. Harrell v. Allen, 183 Va. 722, 33 S.E.2d 222, 226 (1945). The circumstances of this case require determination of the issues including granting of appropriate relief. The doctrine of clean hands should not be applied to deny a full resolution of the issues.

The Conservancy has proved, by a preponderance of the evidence, acts of trespass by the Club on land owned by the Conservancy on Hog Island in the County of Northampton, Virginia. An Order will be entered awarding the Conservancy damages in the amount of ten (10) dollars and barring the Club, its members, guests, agents and employees from the use of the north-south road throughout the Conservancy's tract and the Atlantic beach on lands of the Conservancy, the title of which was derived from Powell, without the permission of the Conservancy, and establishing the right of the Club to travel on the beach access road and utilize the marshes and meadow land of Hog Island. The Club having admitted to the Court that there was no merit to its Counter-Claim, the Counter-Claim is dismissed with prejudice. The Conservancy shall prepare and submit an appropriate Order within ten (10) days.

APPENDIX B

THE NATURE CONSERVANCY,
Appellee,

v.

MACHIPONGO CLUB, INC., a West
Virginia Corporation, Appellant.

THE NATURE CONSERVANCY,
Appellant,

v.

MACHIPONGO CLUB, INC., a West
Virginia Corporation, Appellee.

Nos. 76-2086 and 76-2087.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 6, 1977.

Decided March 2, 1978.

WINTER, Circuit Judge:

This diversity action presents questions of the respective property interests of plaintiff, The Nature Conservancy (Conservancy), and defendant, Machipongo Club, Inc., (Machipongo), in and to Hog Island, a barrier island lying off the Atlantic Coast of Virginia's eastern shore. Conservancy acquired title to substantially all of the land on the northern end of the island by purchase from Edward O'Neil, II, and George Potter O'Neil, except for a 5.4 acre site owned by Machipongo. Machipongo had acquired title to its property by quit claim deed from the United States, which had been given the site by the O'Neils in 1935 for the erection and maintenance of a Coast Guard station. At issue are the ownership and right to use the marsh, meadowland and beaches of Hog Island, as well as certain roads or trails located on the island. All of these contested areas lie outside the site described in the deed from the United States to Machipongo.

In its opinion in Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390 (E.D. Va. 1976), the district court sustained some of Conservancy's asserted property rights but denied others. It held that the North-South road was not a public road and therefore Conservancy could prohibit use of it. It held also that Conservancy could prohibit travel on the Atlantic beach not within the confines of Machipongo's property. With respect to the so-called beach access road, however, it held that a 780' right-of-way from the 5.4 acre site had been established by a previous grant from the O'Neils to the Coast Guard, that the United States had conveyed this interest to Machipongo, and that the United States had also transferred to Machipongo a prescriptive easement from the right-of-way to the beach. Finally, it held that Conservancy's predecessors in title had not acquired title to the marshes and meadowlands where they had been used in common for fishing and fowling and therefore Conservancy could not prohibit the use of them by the public.

Except with respect to the beach access road, we agree with the district court's disposition of the case for the reasons assigned in its opinion. With regard to the beach access road, we conclude that the Coast Guard was not granted a 780' right-of-way and that it did not acquire a prescriptive easement. We affirm in part and

reverse in part.

I.

The facts, both generally and with respect to the beach access road, were fully found by the district court. We will state the pertinent ones only succinctly and we will avoid unnecessary repetition.

The deed from the O'Neils to the Coast Guard in 1935 was preceded by an exchange of correspondence between the parties. The Coast Guard initiated the exchange by a letter asking for the donation of one acre of marshland for a Coast Guard station site. The O'Neils responded and stated their willingness to make the donation, but they asked the Coast Guard to describe "more accurately . . . where you desire the land." In due course the Coast Guard sent a sketch showing the location of the land and almost a month later furnished a metes and bounds description. The description indicated that the quantity of land to be donated was increased to 5.4 acres and included a 50' wide strip right-of-way from the described parcel to what was termed the higher beach, a distance of about 780'. The O'Neils replied to this letter by telegram indicating their willingness to grant the described property.

For some reason or reasons which the record does not reflect, the deed from the O'Neils to the Coast Guard set forth the metes and bounds description of the 5.4 acres but it omitted the description of the 50' wide, 780' long right-of-way from the described parcel to the higher beach. The deed did include, following the metes and bounds description, this language:

(A)ll of which is shown on a map, attached

hereto, by United States Coast Guard, Civil Engineers' Office, Washington, D.C. No. 101,166, dated 10/11/35.

The map was a single sheet containing three sub-maps of differing scale. One depicted the general vicinity of Hog Island, another depicted the north end of Hog Island and the location of the proposed site, and the third depicted the metes and bounds description of the proposed site. Two of the sub-maps showed no indication of any right-of-way or beach access road; however, the one depicting the metes and bounds description included two parallel lines running from the eastern edge of the parcel labelled "Location 50' Right-of-Way about 780' to Higher Beach."

It is not disputed that the Coast Guard used the 780' right-of-way from the time that the station was built, approximately 1936, until it was abandoned in 1964, and also that as the land mass on the north end of Hog Island grew through accretion, the Coast Guard regularly used an even longer right-of-way.* The record indicates that the O'Neils knew about the Coast Guard's use of the right-of-way as extended, yet they never sought to prohibit its use. The O'Neils' understanding concerning the nature of this use may explain their silence. From the descriptive language furnished to him by the Coast Guard but not actually included in the deed, and from his knowledge of the operations of the Coast Guard and the topography, Edward O'Neil, II, surmised that the Coast Guard would

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*Although it is not clear whether the original 780' right-of-way ever reached the seashore, the actual use extended that far.

use the right-of-way as extended in order to launch life boats from the high beach in stormy weather, when launching them from the actual Coast Guard site, which was marshy land, would be impossible. With this knowledge, he acquiesced in the use. Indeed, he and his brother evidenced a pattern of complete cooperation with the Coast Guard over the years. They gave several specific licenses to the Coast Guard to install helicopter pads during World War II, to use a right-of-way to gain access to the back of the Coast Guard station since it was inadvertently built on the edge of the Coast Guard property, and to dump dredged material.

With respect to the 780' of beach access road, the district court ruled as a mtter of law, on the authority of Bossieux v. Shapiro, 154 Va. 255, 153 S.E. 667 (1930), that the depiction of a 780' right-of-way on one of the three sub-maps attached to the 1935 deed constituted a grant of that right-of-way, and that the Coast Guard had obtained a prescriptive easement for the entire length of the right-of-way approximately 3,168' as of 1968 and approximately 3,800' as of 1973.

II.

(1) We disagree with the district court that the deed from the O'Neils to the Coast Guard conveyed the 780' right-of-way. Imprimis, the language describing the right-of-way was omitted from the deed. In the absence of evidence to demonstrate an inadvertent omission, we would infer that the parties intended the consequences of their acts. It therefore follows that the omission was intentional and that the parties did not intend to convey the right-of-way.

It is true that the deed contained the

reference to the attached map that we have quoted and that a sub-map on that document depicts the right-of-way. But the sub-maps depict more. They show also land owned by the O'Neils, as well as water not owned by the O'Neils, and other islands which were clearly never intended to be conveyed. Therefore, we cannot say that the mere appearance of a right-of-way on one of the three sub-maps operated as a conveyance of that right-of-way.

Bossieux, relied on by the district court, does not require a different conclusion. That case concerned a boundary wall which was part and parcel of land described as "bounded according to a survey . . . hereto attached and made a part of this deed, as follows. . . ." There followed a metes and bounds description indicating that the wall in question was the boundary wall of an adjoining property. The survey, however, indicated that the boundary of the property ran down the middle of a double wall. When the purchasers sought to open the wall, it was found to be a single wall and they sued for damages for breach of the convenant of warranty on the theory that the seller had conveyed them half of a double wall as disclosed on the survey. This claim was sustained because:

> When a grantor, in a deed makes a survey or plat a part of his deed, it makes no difference who made the plat or who the surveyor was acting for in making it, the grantor, by incorporating the plat in his deed, accepts and adopts it as his own, and thereafter it will be treated as his own, and it is binding on him. 153 S.E. at 668.

(2) In Bossieux, the seller purported to convey all of the property depicted on the sur-

vey; the O'Neil deed purported to convey only the 5.4 acre parcel. Particularly is the latter true since the parties, before the conveyance, considered a description which included the right-of-way but for undisclosed reasons employed a description which omitted it. The rule of Bossieux is but a rule of construction to be used as a guide in resolving questions concerning the parties' intent. The determinative issue is always the parties' intent. Conner v. Hendrix, 194 Va. 17, 72 S.E.2d 259 (1952). Where, as here, there are facts to disprove the intent which the rule of construction of Bossieux would supply, the parties' real intent must prevail.

(3-5) We also disagree that the Coast Guard obtained a prescriptive easement to all or any part of the beach access road. The Virginia law on prescriptive easement is best explained in Eagle Lodge v. Hofmeyer, 193 Va. 864, 71 S.E.2d 195 (1952). In it various principles of law established by earlier Virginia cases are restated. First, the law does not lightly presume the existence of a prescriptive easement and the burden is on a party claiming one to prove its elements clearly. Second, to ripen into a prescriptive right, the claim to the use must be adverse, i.e., not accorded as a mere accommodation but asserted under a claim of right hostile to the rights of the owner of the servient estate, and it must continue for the prescriptive period. Where the landholder permits the use of his land, either expressly or implicitly, a prescriptive easement can never arise.

The use here continued for the prescriptive period, but we do not think that an adverse use has been clearly proved. Initially the O'Neils gave the site for a lifeboat station. They welcomed the Coast Guard and consistently permitted it to use their land in connection with its undertakings. Thus, it is hardly surprising that they lodged no objection to the use of the beach access road. The inference that the use was permissive is especially strong here because Edward O'Neil, II, knew from the topography of the site that lifeboats could not be launched from the site when they would most be needed. Aside from a possible inference to be drawn from the fact of continued use, there is no evidence that the Coast Guard claimed any right to use the road. Indeed, when the government invited bids for the purchase of the property, after the Coast Guard abandoned it, the government advertised the sale of the 5.4 acre site but made no mention of any right-of-way. We think that the weight of the evidence requires the conclusion that the Coast Guard had a license, express or implied, to use the beach access road but that it did not acquire a prescriptive easement.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX C

THE NATURE CONSERVANCY,
Appellee,

v.

MACHIPONGO CLUB, INC., a West
Virginia Corporation, Appellant.

THE NATURE CONSERVANCY,
Appellant,

v.

MACHIPONGO CLUB, INC., a West
Virginia Corporation, Appellee.

Nos. 76-2086, 76-2087.

United States Court of Appeals,
Fourth Circuit.

July 31, 1978.

Before WINTER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

PER CURIAM:

The parties and the Commonwealth of Virginia have all filed petitions for rehearing, some with suggestions for rehearing in banc. The petitions reargue the correctness of the several issues which were presented by this appeal, including (1) the Conservancy's right to prohibit use of the North-South Road, (2) the Conservancy's right to prohibit travel on the Atlantic beaches not within the confines of Machipongo's property, (3) the Conservancy's right to prohibit use of the meadow and marshlands by the public for fishing and fowling, and (4) whether Machipongo had obtained a right-of-way from the property it purchased to the beach (the so-called Beach Access Road).

In our opinion, we decided that Machipongo had not obtained title to the Beach Access Road. In this respect, we reversed the judgment of the district court. We affirmed the judgment of the district court with respect to its holding that the North-South Road was not a public road and therefore the Conservancy could prohibit use of it, that the Conservancy could prohibit travel on the beaches not within the confines of Machipongo's property, and that the Conservancy could not prohibit the use of the meadow and marshlands for fishing and fowling by the public.

In deciding the rights of the parties with respect to use of the beaches not within the confines of Machipongo's property and use of the meadow and marshlands for fishing and fowling, the district court was obliged to consider and apply a number of Virginia statutes which had not been authoritatively construed by the Virginia courts.

Subsequent to the filing of the several petitions for rehearing and before we had taken formal action thereon, we were advised that there has been filed in the Circuit Court for the County of Northampton, Virginia, a bill of complaint for declaratory judgment and injunctive relief. The bill of complaint was filed by numerous Virginia citizens and residents against the Conservancy and its resident manager. The bill of complaint seeks an adjudication as to whether the Conservancy has title to the Atlantic beaches outside of the confines of Machipongo's property and to the meadow and marshlands of Hog Island with the right to bar the plaintiffs

and other members of the public therefrom. It is alleged that, to the extent that the Conservancy claims title to the beaches and to the meadow and marshlands by virtue of grants from the Commonwealth of Virginia in 1901, the grants are void by virtue of various statutes of the Commonwealth of Virginia, as the statutes should be properly construed and applied. The bill of complaint further asserts that the North-South Road is a public road by dedication and acceptance or by prescriptive right, and that there are other roads and easements on Hog Island which, through long and uninterrupted use by the owners of property on Hog Island the public at large, have become and remain lawful roadways or easements permitting access to and ingress and egress to and from the shores, creeks and landings on Hog Island.

(1,2) Since the district court, in deciding the instant case, was exercising diversity jurisdiction, it was its function as well as ours to apply the law of Virginia as articulated by the Supreme Court of Virginia, or as we in our informed judgment predicted would be applied by the Supreme Court of Virginia were the case before it. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In deciding the issues of whether the Conservancy acquired title to the Atlantic beaches outside of the confines of Machipongo's property and to the meadow and marshlands, and the right to prohibit use of the beaches as well as use of the meadow and marshlands, the district court and we were required to construe and apply various Virginia statutes as to which there was no definitive interpretation by the Supreme Court of Virginia. Under Erie, we are fully aware that the construction we have afforded such statutes is not definitive. At most, our construction is only persuasive and should the Supreme Court of Virginia construe

the statutes differently from us, its decision will prevail.

(3) Although Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943), demonstrates that federal courts normally do not abstain in diversity cases, we read Louisiana Power & Light v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959), as permitting abstention in diversity cases where (1) state law is unsettled, and (2) an incorrect federal decision might embarrass or disrupt significant state policies. See Hart & Wechsler, The Federal Courts and the Federal System 1002-1005 (2d ed. 1973); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts Section 1371, at 49 (official draft 1969). See also Colorado River Water Conservation District v. United States, 424 U.S. 800, 813-15 & n. 21, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

(4,5) Abstention in this case is proper with regard to the issues of statutory interpretation that relate to the ownership of the beaches and the meadow and marshlands. The interpretation of the statutes is unsettled, so a federal court would be required to reach its judgment without any guidance from the authoritative tribunal, and the issue of the ownership of the beaches and meadow and marshlands raises fundamental questions of public policy that should be resolved in the first instance by the state courts. With respect to the ownership of the beaches, meadow and marshlands, we are not unmindful that an incorrect federal decision might adversely affect property owners throughout all of Virginia's coastal regions. Conversely, the issues of the North-South Road and the Beach Access Road involve

no statute the interpretation of which is unsettled, nor do they involve questions of public policy transcending the interest of the parties. Abstention as to them, particularly after a full trial and two federal adjudications, is not warranted.

Since we are now assured that a definitive decision by the Virginia courts on the statutory issues relating to the ownership of the beaches and the meadow and marshlands will be forthcoming, we think that we and the district court should defer decision until the state courts have spoken. By this course we also avoid the potential problems of res judicata or collateral estoppel that might be presented should the Virginia Supreme Court construe the statutes differently from us. We have therefore concluded to grant rehearing in part and to modify our directions to the district court.

In accordance with the opinion we have previously filed, we affirm the district court in part and reverse in part as therein indicated. However, we remand the case to the district court with the instruction that the district court shall stay its judgment with respect to the Atlantic beaches outside of the property of Machipongo and the meadow and marshlands within the property of the Conservancy until the final decision of the Supreme Court of Virginia in the case filed by Archie L. Bradford, et al. v. The Nature Conservancy, et al., Chancery No. 16, in the Circuit Court for the County of Northampton, unless the plaintiffs are responsible for any reasonable delay in such decision. Should the Supreme Court of Virginia decide either of said issues differently from our decision with respect thereto, the district court shall conform its decision to that of the Supreme Court of Virginia, notwithstanding our views, conducting

such further proceedings as may be necessary and desirable. Should the views of the Supreme Court of Virginia coincide with our own, or should plaintiffs unreasonably delay the decision by the Supreme Court of Virginia, the district court shall vacate its stay of final judgment in accordance with the opinion we have heretofore filed.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE NATURE CONSERVANCY, Plaintiff	)	
v.	)	CIVIL ACTION
MACHIPONGO CLUB, INC., Defendant	)	NO. 74-461-N

OPINION AND ORDER

On July 29, 1976, the defendant, Machipongo Club, Inc., filed a Motion to Amend or Alter Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Oral argument on the motion was heard on the same date. Machipongo attacks the memorandum opinion of this Court entered July 14, 1976, on four grounds.

(1) Erroneous interpretation of Section 1338 of the Code of Virginia of 1887 by the Court.

(2) The failure of the Court to consider Section 2341 of the Code of Virginia of 1887.

(3) The failure of the Court to find that the use of the north-south road is a right, roadway, privilege, appurtenance, and advantage of Machipongo's land by conveyance from the United States.

(4) A failure to find Machipongo has a right to the use of the north-south road by virtue of an implied dedication, or by prescriptive use for more than twenty years.

At oral argument, counsel for Machipongo was advised that the Court was of the opinion that it had fully considered the question of the right of Machipongo to use the north-south road and that Machipongo's motion to amend that portion of the Court's memorandum opinion would be denied. The Court believes Machipongo's argument in support of its third and fourth reasons to amend the Court's judgment merely reiterates its previous position on this issue.

Machipongo advances two reasons in support of its position that Machipongo is entitled to the use of the Atlantic Beach of Hog Island. Simply stated, Machipongo believes that Section 1338 of the Code of Virginia of 1887 voided the Powell grant which had conveyed to Powell (the Conservancy's predecessor-in-title) the Atlantic beach. Furthermore, Machipongo argues that Section 2341 of the Code of Virginia of 1887 was and remains a separate statutory prohibition against the conveyance of the Atlantic beach to Powell.

Machipongo interprets Sections 1338 as invalidating any grant of unappropriated "common lands." It states that by Section 1338 "shores of the sea" became "common lands" as a matter of law unless "conveyed by special grant or compact." To reach this conclusion, Machipongo construes the clause of Section 1338 which reads "express prohibition against grants by the State of any oyster bed, rock, or shoal" as inclusive of the phrase "shores of the sea" because the language as to natural oyster beds, etc. is the language of the Constitution of Virginia. Machipongo seems to say that the special language of the Constitution of Virginia as to natural oyster beds, rocks, and shoals should not detract from the attempt of Section 1338 to prohibit grant of the shores of the sea.

The Court has previously stated its interpretation of Section 1338 and the clauses referred to

by Machipongo. The additional argument of Machipongo not heretofore considered is the distinction Machipongo seeks to draw between "express grant or compact" and what it refers to as the general land-grant system of Virginia.

Two obvious questions are raised by Machipongo's argument. The first is the historical meaning of "common lands" in Virginia law. The second question is the lack of evidence concerning the meaning of the term "Special grant or compact according to law."

The Court is not aware of any provisions in the Code of Virginia or the Virginia Constitution effective in 1901 which described either special grants or compacts of land other than the statutory land grant system. The defendant Machipongo equates "special grant or compact" with either a general repeal of Section 1338 or special legislation to grant specific parcels. The plaintiff (the Conservancy) argues that the term "common lands" was historically thought to designate specific tracts of land designated for public use. The Conservancy also states that authorities on the Virginia law are confused as to the exact derivation of the term "common lands." However, the Conservancy maintains that the term "common lands" was never meant to include all beaches or "shores of the sea."

The lack of definitive information concerning the meaning of the term "common lands" in 1901 reinforces the Court's approach of interpreting Section 1338 according to the plain meaning of the words contained therein and the effect of the statutory provisions for granting unappropriated lands.

Machipongo also argues that Section 2341 expressly prohibited in 1901 the granting of "any estate or interest in lands which are a common under chapter sixty . . . but every such grant for any

such lands . . . shall be absolutely void." Chapter Sixty of the Code of Virginia of 1887 includes Section 1338 which Machipongo says makes "common lands" of the shores of the sea which are not conveyed by special grant or compact. The position taken by Machipongo as to the effect of Section 2341 necessary relies on the Court's accepting Machipongo's interpretation of Section 1338. The Court has previously stated that it interpreted Section 1338 in its memorandum opinion of July 14, 1976.

For the reasons stated the defendant's Motion to Amend of Alter Judgment is DENIED.

The Clerk is directed to send a copy of this Opinion and Order to all counsel.

J. Calvitt Clarke, Jr.

United States District Judge

September 12, 1978

Norfolk, Virginia

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE NATURE CONSERVANCY,	)	
	)	
Plaintiff	)	CIVIL ACTION
v.	)	
	)	NO. 74-461-N
MACHIPONGO CLUB, INC.,	)	
	)	
Defendant	)	

O R D E R

In accordance with the directives of the Fourth Circuit Court of Appeals set forth in its opinions of March 2, 1978, and July 31, 1978, it is ORDERED:

1. That the Machipongo Club, Inc., its members, guests, agents and employees be hereby and forever enjoined and barred from the use of the beach access road which road extends from the Club property to the Atlantic beach without the permission of the Conservancy and that the provision to the contrary of this Court's Order of July 28, 1976, contained in paragraph (3) thereof, is vacated and of no force and effect, and

2. That provisions of the Memorandum Opinion of this Court of July 14, 1976, determining that the Conservancy owned the Atlantic beach to low water in that portion of its property which was formerly owned by Powell and that portion of said Order declaring any title claimed by the Conservancy to the marshes and meadowlands to be null and void both be stayed pending decision in an action now pending in the Circuit Court of Northampton County, Virginia, and a review of that court's decision by the Supreme Court of Virginia, in which such pending action the question of the ownership and control of the aforesaid beach and the marshes and meadowlands is being addressed.

Provided, however, that should the state court action be not pursued vigorously to a speedy conclusion by the parties, this Court will dissolve the stay provided for herein. Either party may at any time petition the Court to dissolve the stay herein ordered on the ground of undue delay in pursuing the state action or in undue delay in the bringing of that action to a conclusion.

J. Calvitt Clarke, Jr.

United States District Judge

September 12, 1978

Norfolk, Virginia

APPENDIX F

Appendix F - 1

§41.1-3. Grants of certain lands, etc., to be void; such lands, etc., under control of Governor. --No grant shall be valid or effectual in law to pass any estate or interest in any lands unappropriated or belonging to the Commonwealth, which embraces the old magazine at Westham, or any stone quarry now worked by the State, or any lands which are within a mile of such magazine, or any such quarry, or to pass any estate or interest in lands which are a common under § 62.1-1, or to pass any estate, or interest in any natural oyster bed, rock, or shoal, whether such bed, rock, or shoal shall ebb bare or not, or interest in any islands created in the navigable waters of the State through the instrumentality of dredging operations conducted by the United States between parallel or concentric lines fifteen hundred feet on either side of the channel axis, but every such grant for any such lands, islands, bed, rock, or shoal shall be absolutely void; provided, however, this section shall not be construed to affect the title to grants issued prior to March fifteen, nineteen hundred thirty-two. Such magazine and every such stone quarry and every such natural oyster bed, rock, or shoal, and the lands of the Commonwealth adjacent to or in their neighborhood, shall be under the control of the Governor, who may make such regulations concerning the same as he may deem best for the interests of the State. (Code 1950 (Repl. Vol. 1953), § 41-8; 1970, c. 291)

Appendix F - 2

§41.1-4. Unappropriated marsh or meadowlands on Eastern Shore; common for fishing and hunting.--All unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this State, shall continue as such common, and remain ungranted. Any of the people of this State may fish, fowl, or hunt on any such marsh or meadowlands. (Code 1950 (Repl. Vol. 1953) §41-8.1; 1970, c. 291.)

Appendix F -3

§62.1-1. Ungranted beds of bays, rivers, creeks and shores of the sea to remain in common.--All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28.1, and any future laws that may be passed by the General Assembly. And no grant shall hereafter be issued by the State Librarian to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock or shoal shall ebb bare or not. (Code 1950, §62-1; 1960, c. 533; c. 659).

Appendix F - 4

§41.1-6. Ratification of grants issued pursuant to §41.1-3.--Any grants for land heretofore issued by the State Librarian pursuant to §41.1-3 (§41-8 of the Code of 1950) are hereby ratified and confirmed and title is confirmed in the grantees thereof. (Code 1950 (Suppl.), § 41-8.3; 1966 c. 427; 1970, c. 291).

Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-656

MACHIPONGO CLUB, INC., *Petitioner,*

v.

THE NATURE CONSERVANCY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

TIMOTHY ATKESON
ALLAN GATES
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Of Counsel

HARDY WIETING, JR.
WILLIAM C. GUDAL
1800 North Kent Street
Arlington, Va. 22209

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-656

MACHIPONGO CLUB, INC., *Petitioner,*

v.

THE NATURE CONSERVANCY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Nature Conservancy, respectfully requests that this Court deny the petition for writ of certiorari to review the Fourth Circuit's decision in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Questions Presented By The Petition Involve No Conflict Of Decisions Nor Any Question Of Public Importance

Although the petition for certiorari states that three questions are presented for review in this case, the petition notably does not suggest that any of the issues warrant full review by this Court. Instead, the petition asks this Court to reverse the Court of Appeals summarily without briefing or argument and to direct the courts below to abstain from exercising jurisdiction.

Petitioner's failure to seek plenary review in this Court is not surprising because the questions presented are narrow issues which have no public importance, and the decisions below do not conflict with any decision of any other court, state or federal.

The first two questions presented by the petition are narrow, fact-bound easement and right-of-way issues that turn upon state rather than federal law. Respondent submits that these easement and right-of-way questions were correctly decided in the courts below. Even if the decisions below were in error, however, the existence or non-existence of any easements or rights-of-way on an uninhabited island off the coast of Virginia plainly is not a matter that warrants full consideration by this Court.

The third question presented by the petition—the propriety of the lower court's decision not to abstain with respect to the easement and right-of-way questions—also fails to warrant plenary review in this Court. The standards for applying the abstention doctrine in diversity cases were first articulated by this Court in *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). As the Court then stated, abstention is not appropriate in diversity cases merely because the action turns upon difficult questions of unresolved state law. Instead, abstention is appropriate only when the case presents exceptional circumstances of overriding public policy, such as those presented in *Pullman*[1] or

[1] Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) (abstention where definitive resolution of state law question could make decision of federal constitutional claim unnecessary).

Burford[2] type situations. 320 U.S. 234-235. In the twenty-five years that have elapsed since this Court's decision in *Meredith*, the lower federal courts have not encountered any difficulties in determining when to abstain in diversity actions. The decision of the Court of Appeals in this case was entirely consistent with the well-developed body of lower court case law regarding abstention in diversity cases. As a consequence, there is no conflict of lower court decisions nor any other reason of public importance that would warrant plenary review by this Court.

2. Petitioner's Request For Summary Reversal Of The Court Of Appeals Decision Is Without Merit

Federal court abstention necessarily entails substantial delays, additional costs, and duplicative litigation for the parties involved. As a consequence, abstention is a procedural device that is properly employed only where significant public policy considerations outweigh the added burdens and costs that abstention necessarily entails. The proceedings below in this case raised two issues—the statutory commons issues regarding marshlands and the shores of the sea—which arguably did involve public policy considerations of sufficient doubt and public importance to warrant abstention. The easement and right-of-way questions, however, plainly were not of similar importance. These latter questions were typical real property disputes with little or no significance to anyone beyond the parties themselves. The factual record relevant to the easement and right-of-way claims was fully developed in the courts below, and

[2] Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention where federal court decision of state law question could seriously disrupt a complex state regulatory scheme).

there was no substantial dispute about the applicable state law. Moreover, since respondent allows and encourages the general public (including petitioner) to fish from, swim from, hike upon, birdwatch on, and generally use all of its lands on Hog Island *by foot*, the only real dispute presented by petitioner's easement and right-of-way claims was whether petitioner's members, guests, and employees would have to walk or travel by boat [3] when using respondent's lands. Under these circumstances, abstention with respect to the easement and right-of-way claims plainly would have been inappropriate.

3. Petitioner Did Not Raise Or Argue In The Courts Below The Abstention Question Presented In Its Petition

It is well established that this Court ordinarily will not entertain questions that were not raised or considered in the courts below.[4] In this case, petitioner did not raise or argue the question of abstention in the District Court. Nor did petitioner brief or argue abstention on

[3] Petitioner owns an abandoned Coast Guard lifeboat station on the western shore of the north end of Hog Island. It is undisputed that petitioner has access by boat to its own property as well as to the property of respondent. It is also undisputed that there is no means of external access to any part of Hog Island except by boat. The dune buggies and other vehicles used by petitioner on Hog Island were transported to Hog Island by barge sometime after the petitioner acquired the abandoned Coast Guard station in 1966.

[4] *E.g.*, United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); United States v. Ortiz, 422 U.S. 891, 898 (1975); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

the merits before the Court of Appeals.[5] Petitioner first suggested the possibility of abstention in its petition for rehearing *en banc*. Even then, petitioner did not specifically urge abstention with respect to the easement and right-of-way issues. Instead, petitioner's request for rehearing *en banc* specifically urged abstention only with respect to the statutory commons issue regarding the "shores of the sea." The petition notably did not address the question now urged upon this Court, namely, whether the Court of Appeals could or should abstain with respect to the statutory commons issues without also abstaining from decision of the easement and right-of-way claims. Having failed to raise its abstention claims in the courts below, petitioner's request for certiorari regarding these claims should be denied.

To the extent that petitioner is seeking to have this Court summarily correct what petitioner perceives to be an error in the Court of Appeals mandate, it should be noted that petitioner never asked the Court of Appeals for such a correction. Nor did the petitioner ever move for a stay of the mandate.

4. Petitioner Has No Standing To Raise The Abstention Questions Argued In Its Petition

The basic cause of action in this case was trespass. Petitioner essentially admitted entry and use of respondent's lands. Insofar as petitioner's entry and use involved dune buggy riding and other vehicular use,

[5] The Virginia Attorney General filed an *amicus curiae* brief in the Court of Appeals which did seek abstention, but only with respect to the statutory commons issue regarding the shores of the sea. Petitioner did not join in even this limited suggestion of abstention in either its merits brief or its oral argument before the Court of Appeals. *See also* note 6, *infra*.

petitioner defended its conduct by claiming an affirmative right to use what it alleged were private easements, rights-of-way, or public roads on Hog Island. Petitioner expressly requested both the District Court and the Court of Appeals to grant injunctive relief and a declaratory judgment that it had a private or public right to continue its use of dune buggies and other vehicles on respondent's lands. Since petitioner was the party who raised the easement and right-of-way questions and pressed for their adjudication, petitioner has no standing to argue now that the courts below should have abstained from deciding these issues.

The only party that might have had standing to urge such abstention was the Virginia Attorney General; and the Virginia Attorney General expressly stated that the Commonwealth's interests were limited to the statutory commons issues.[6]

5. The Petition Should Be Denied Promptly To Avoid Confusion In The State Court Proceeding

The original panel decision in this case was rendered on March 2, 1978. Two weeks later, petitioner filed a petition for rehearing *en banc*. On March 22, 1978, the Court of Appeals authorized respondent to file a response to petitioner's petition for rehearing *en banc*. On April 5, 1978, respondent filed its response to petitioner's petition for rehearing *en banc*. On May 16,

[6] The Virginia Attorney General has intervened as a party in the state court proceedings discussed *infra*, at pp. 6-8. As in the federal proceedings, the Virginia Attorney General has not taken any position in the state court action regarding the easement, right-of-way, and public road claims. Instead, the Virginia Attorney General has limited his arguments in state court to the statutory commons issues regarding the marshland and the shores of the sea.

1978, while petitioner's petition for rehearing *en banc* was still pending, counsel for petitioner filed an action in state court on behalf of nineteen individuals closely related to petitioner Machipongo Club. *Bradford, et al.* v. *The Nature Conservancy, et al.*, Chancery No. 16 (Cir. Ct., Northampton County, Virginia). This action seeks declaratory and injunctive relief upon the same claims that were advanced by petitioner in the Federal proceedings in the courts below.

In September and October 1978, the state court heard testimony and preliminary argument in *Bradford, et al.* v. *The Nature Conservancy*. The evidence and arguments presented in state court were substantially identical to the evidence and arguments presented in petitioner's case in federal court. In particular, the state court plaintiffs introduced evidence and advanced arguments to show that petitioner Machipongo Club owns the private easements and rights-of-way which Machipongo Club attempted unsuccessfully to establish in the federal proceedings below. Although petitioner Machipongo Club is not a party to the state court proceedings, the state court plaintiffs have argued that they are entitled to use any private easements and rights-of-way owned by Machipongo Club because Machipongo Club has given them permission for such use. To support their claims deriving from Machipongo Club's alleged easements and rights-of-way, the state court plaintiffs rely upon an unrecorded written conveyance that Machipongo Club executed on September 18, 1978. This unrecorded conveyance purports to grant to one of the state court plaintiffs an irrevocable license to use any private easements or rights-of-way that may be owned by Machipongo Club.

In the state court proceedings, respondent has argued that the state plaintiffs' claims of private easements, rights-of-way, and roads are barred by *res judicata* to the extent that the claims derive solely from Machipongo Club. Counsel for the state court plaintiffs and petitioner Machipongo Club has responded to this argument by stating that the federal proceedings will not be final with respect to the easement and right-of-way questions until Machipongo Club's petition for certiorari is denied.

The state court proceeding is now being briefed on the merits. The state trial court has scheduled final oral argument and submission of the case for December 7, 1978.

Respondent respectfully submits that petitioner's request in this Court for a writ of certiorari is designed solely to confuse the state court proceedings by delaying as long as possible the finality of the judgment it sought and lost regarding its claims of private easement and right-of-way. Respondent therefore urges this Court to deny the petition for certiorari and to do so prior to December 7, 1978, the date of final argument in the state trial court proceedings. Such a denial would preclude the state court plaintiffs from relitigating Machipongo Club's claims of private easements and rights-of-way and would properly focus the state court proceeding upon the nonderivative easement and public roads claims that the state court plaintiffs are advancing in their own right.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the petition for certiorari and that it do so before December 7, 1978.

Respectfully submitted,

TIMOTHY ATKESON
ALLAN GATES
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1978, I served the foregoing Respondent's Brief In Opposition by depositing three copies in the United States mail, first-class postage prepaid, to each of the following:

SENATOR HERBERT H. BATEMAN
JONES, BLECHMAN, WOLTZ & KELLY, P.C.
2600 Washington Avenue
First & Merchants National Bank Building
Newport News, Va. 23607

JAMES E. MOORE, ESQ.
Assistant Virginia Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Va. 23219

ALLAN GATES
Counsel for Respondent